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In The

Supreme Court of the United States

October Term, 1969

No. 902

DOMINICK DI NORSCIO and RALPH MASCIOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Dominick Di Norscio and Ralph Masciola, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 15, 1969 which judgment affirmed a judgment of conviction and sentence of the United States District Court for the Southern District of New York, filed on March 12, 1969.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra, has not as yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did not the lower court's ruling upholding the refusal of the main government witness to reveal his place of employment violate the rule of Smith v. Illinois, 390 U.S. 129 (1968)?

2. Is there not a conflict among the Courts of Appeals in applying Smith v. Illinois and have not those decisions effectively emasculated the holding of that case?

3. Did not the lower court's ruling that the sufficiency of the evidence concerning a defendant's membership in a conspiracy, based upon his own acts and declarations, is a preliminary question for the judge and, once decided, is not to be re-submitted to the jury, deprive petitioners of due process of law and their right to trial by jury, and are not the rulings of the Courts of Appeals on this question in conflict?

4. Should not Di Norscio have been acquitted of the conspiracy charged where the proof showed, at best, that he was merely associated with those who purchased the goods from the thief?

5. Were not the verdicts in the instant case inconsistent as to Di Norscio and, if so, should not the rule of Dunn v. United States, 284 U.S. 390 (1932), be reconsidered and abandoned?

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C. Sections 2, 371, 659, 2312, 2314 and 2315. They are printed in Appendix B, infra.

STATEMENT

Petitioners, Di Norscio and Masciola were charged in four counts of a five count indictment along with ten other persons. The First Count charged a conspiracy to steal vehicles in interstate commerce, transport the trucks and their contents in interstate commerce, and to dispose of the contents after they had moved in interstate commerce (7a-10a).* The Third Count charged the substantive offense of stealing a certain vehicle and its contents which were moving in interstate commerce (11a-12a). The Fourth Count charged the kidnapping of the driver of the stolen vehicle (12a-13a), and the Fifth Count charged the transporting of the stolen goods in interstate commerce (13a-14a). The trial of these defendants was severed from that of other defendants and they proceeded to trial only with Edward Baker. At the conclusion of the Government's case, the court dismissed the kidnapping count as to these petitioners. Masciola was convicted on both substantive counts, as well as on the conspiracy charge. Defendant Di Norscio was acquitted on the substantive counts and convicted only of the conspiracy. On March 12, 1969, Masciola was sentenced to five years on the conspiracy charge

* "a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Second Circuit which appendix has been certified and filed with this petition as a part of the official record below.

and seven years on each substantive count, all the sentences to run concurrently (197a-198a). Di Norscio was sentenced on the conspiracy count to a term of five years and a committed fine of $5,000 (199a-200a).

Testimony at the trial proved that in the second week of October, 1966 a truck, carrying merchandise moving in interstate commerce, was hijacked in New York City and thence transported, along with the driver, to Jersey City, New Jersey. The driver tentatively identified the defendant Baker as one of the men who participated in the theft.

The main Government witness was Roland Warren, an alleged accomplice who was named as a co-defendant in this indictment. Warren testified that during the period October 7 to 13, 1966, he met a man named Joseph Roselli at a bar in Newark (19a-20a). Roselli had died prior to the trial (19a). Roselli told Warren that he knew some people that wanted to buy a load of clothes from Gilbert Carriers and he suggested that Warren steal another load (21a). Warren was hesitant because he had not been paid for the previous load he had stolen (21a-22a). The next day or so Roselli again approached Warren at this bar and asked him to come with him and meet the people who wanted to buy the load (23a). They went to a house on Boylan Street in Newark (23a) where Warren met several men, Vito, Ralph and Danny (24a). The house belonged to Ralph (24a), who was identified as the petitioner Masciola (25a). Ralph asked Warren if he could take another "shot" at Gilbert and told Warren that he need not worry about not being paid (25a). Warren then

agreed to try it again (26a). The next day Warren met Roselli again. He told him that he had come from Ralph's house and they were ready for him to steal the truck (27a). Warren replied that he had to find someone to help him (27a). Warren and Roselli agreed to meet again that night in a diner in Jersey City. During that day Warren was approached by the defendants, Baker and Ramon Comer, both of whom were interested in making some money by helping Warren steal a truck (28a-32a). Warren met Roselli that evening in Jersey City along with Baker and Comer (32a). It was agreed that Baker would hold up the driver, Warren would drive the truck and Comer would drive their car (33a). Roselli told Warren that as soon as he got the truck he should call a certain number and then go to the Club 36 in Newark (33a-34a). He indicated that the number was at Ralph's house (34a). Warren then described how he, Baker and Comer, traveled to New York City and stole the truck (34a-36a). They locked up the driver in a truck in Jersey City and then called the phone number previously given by Roselli (37a-38a). He parked the truck nearby and walked to the Club 36, in Newark (38a). After 15 or 20 minutes in the bar, Roselli, Ralph and Vito came in (39a). After a call was made, they then left the club and went to another bar on Wilson Avenue (39a-40a). Roselli and Masciola stayed outside, saying that they were going to wait for the buyer to arrive (40a). Some time later, Warren was beckoned outside where a third party was counting out money to Roselli (40a-41a). Warren then followed the buyer to the "drop" in Passaic (42a). Warren was promised the balance of his money in the morning (43a). Warren called Roselli all the next day and finally arranged to go to Passaic with him the following morning (43a-44a). They

went to Passaic and parked, leaving Warren in the car (44a). After about two hours in the car, Warren got out and walked towards the corner where he saw Roselli waiting for someone in a phone booth (45a). Roselli introduced him to this man, who was called "Tommy Adams," and who was identified as Defendant Di Norscio (45a). Di Norscio told Warren that the load was not the best since it contained a lot of maternity clothes. He told him that if

> "...these guys don't do something with it by this evening, I am going to get some trucks and get it out of there myself" (45a).

Warren indicated that he wanted the rest of his money and Di Norscio gave him a hundred dollars and told him that that would hold him over until they see what they can do with the rest of the clothes (45a-46a).

On cross-examination Warren was asked where he worked. The court sustained a Government objection to this question and then indicated that the matter would be pursued later (62a). The following morning the matter was argued further (66a-69a), and the court indicated a disposition to permit the questions (69a-73a). However, when counsel again asked the question, Warren refused to answer it (79a-80a). The trial judge then interrogated the witness on a voir dire. Warren testified that he was afraid of Masciola dn Di Norscio (96a-103a). Warren stated that he had been threatened "indirectly... in other cases" (98a) but admitted that he had not been threatened by either Di Norscio or Masciola (98a). Warren based his fear of Masciola upon the fact that at one time Masciola had allegedly

2. In its final instructions, the court charged that the jury's first task was to determine whether beyond a reasonable doubt the charged conspiracy was shown to have existed (R. 432). They were told that only after such a finding should they consider whether each defendant was shown beyond a reasonable doubt to have knowingly and wilfully become a member of the conspiracy (R. 432). The court then gave the instruction of which petitioners complain (Pet. in No. 902, p. 13) that the participation of any defendant in the conspiracy could be determined from evidence of his own acts and statements and the acts and statements of other alleged members (R. 433). As petitioners admit, this instruction is in accord with the rule in the Second and Ninth Circuits. *United States* v. *Nuccio,* 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906; *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. The older practice, as exemplified in the cases cited by petitioner, was to charge that, while all the evidence could be considered in determining whether a conspiracy existed, the jury must determine from independent proof of the defendant's own acts that he was a member of the conspiracy, and then could consider acts and declarations of co-conspirators in determining guilt beyond a reasonable doubt. The present rule in the Second and Ninth Circuit results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure while, at the same time, it safeguards the rights of the defendant in that the judge must determine, as a

matter of law, whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury.

In any event, the manner in which the jury was instructed on this aspect of the issue was of no real significance in the present case. This was not a case in which the proof of petitioners' participation depended on declarations by co-conspirators. Masciola was shown to have been directly involved in the planning of the theft of the truck as well as the theft itself. As to DiNorscio, the evidence was entirely of his own acts and declarations. There were no hearsay declarations as to him. As discussed below, the jury had a right to believe from his own acts that he had known of and joined in the conspiracy to hijack even though the evidence related to what he did after the hijacking occurred.

3. DiNorscio contends he should have been acquitted of the conspiracy charge since the evidence, at most, showed him involved only in the distribution of stolen goods. It is true that absent proof of any prior or contemporaneous agreement, the acts of buying and selling stolen goods do not constitute the crime of conspiracy. That more than a sales agreement was involved here, however, is evident from petitioner's own acts, declarations and conduct. The jury could reasonably conclude that when he paid Warren $100, he did so with full knowledge of Warren's role, acquired before the hijacking took place, and that his own role as receiver and distributor of the stolen goods was part of the overall plan. It was not inconsistent for

the jury to find that he was involved in the overall plan but not so intimately involved in the substantive crime that the jury would wish to hold him responsible therefor.

4. Petitioner Baker's contention that the identification procedure followed here was violative of due process is adequately answered by the opinion below. Voir dire indicated that the truck driver's identification would be based upon extended personal observations. That it was unclouded by alleged improper suggestion is evidenced by the witness' insistence upon seeing Baker in person before he could state whether or not Baker was the gunman. Defense counsel's decision to proceed at that point, without more, was a free choice of trial strategy. Moreover, Warren, the government's principal witness, whose credibility was resolved by the jury in his favor, likewise identified Baker as the gunman in the hijacking.

5. At the close of the government's case the trial judge stated outside the presence of the jury:

* * *

> Yes, I dismiss count 3 as to the defendant Baker on the ground that that was tied in with the other conduct and that the element of criminal intent is missing. [R. 401.]

The prosecutor then urged upon the court cases supporting Baker's culpability under the kidnapping count. After a few minutes of study, the court announced:

> * * * what I have done is to revise my statements of the ruling with respect to the defendant Baker and under the authority of *United*

> *States* v. *Healey* in 376 U.S. 75 (1964), I hold that the motion with respect to the * * * kidnapping count * * * is denied.

Defense counsel objected that such a ruling "constitutes a second and further jeopardy * * *" (R. 405). The court stated:

> * * * I think that it is always permissible to the court to correct an inadvertence as an immediate matter during the course of argument of motions and in the absence of the jury and prior to the continuance of the trial. [R. 405.]

The court was clearly correct in so ruling. *Fong Foo* v. *United States,* 369 U.S. 141, on which petitioner relies, is not controlling here. In that case the court, during the government's case, had directed the jury to return a verdict of acquittal, and formal judgments of acquittal were subsequently entered. This Court ruled that the indictment terminated with the entry of the final judgment of acquittal and that judgment could not be reviewed without putting the petitioners twice in jeopardy. In the instant case, no final judgment had been entered. The effect of the trial court's almost immediate ruling was not to reindict Baker, but simply to correct a statement made during the course of argument.

6. Baker was arrested in his sister's apartment and was given a full *Miranda* warning. As the agents were searching, Baker asked if the agents were looking for the guns. On being told that they were, he proceeded a few steps back into the bedroom where he had been hiding when arrested and pointed to a drawer which he said contained a sack with the guns

(R. 336–352, 365–367). Baker urges in this Court that the guns should have been excluded under the rationale of *Chimel* v. *California*, 395 U.S. 752. The courts of appeals which have considered the question of the retroactivity of *Chimel* have concluded that the ruling ought not to be applied to searches, like the one here, conducted prior to the date of the decision therein. *United States* v. *Bennett, et al.*, 415 F. 2d 1113 (C.A. 2), decided September 9, 1969, petition for a writ of certiorari pending, No. 1249 Misc., this Term; *Lyon* v. *United States*, 413 F. 2d 186 (C.A. 5), petition for a writ of certiorari pending, No. 1072 Misc., this Term. Moreover, in light of the direct evidence of Baker's role, the guns were not significant evidence. The driver of the truck could not identify them as the ones used in the hijacking (R. 90).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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